The Role of Proportionality in Sentencing Repeat Theft Offenders

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Arguably, proportionality is at its most persuasive when stated in its simplest form:[1] that the severity of the punishment should reflect the seriousness of the offence. The law is justified in meting out greater punishment on a murderer than a petty thief, not necessarily because the former is more likely to reoffend or poses a greater threat to public safety, but because of the seriousness of his offence. Numerous contemporary sentencing practices violate this basic form of desert. These are often based on the supposed dangerousness of the offender (e.g. imprisonment for public protection and life without parole), or offenders who offend with such frequency that the law determines to take a different approach at sentencing (e.g. three-strikes legislation and mandatory minimum sentences). These latter provisions are often imposed in part due to the seriousness of the offence, but largely in an effort to reduce offending chiefly through deterrence or incapacitation.[2] Californian three-strikes legislation only applies where the first two offences are 'serious felonies', and mandatory minimum sentence provisions in England and Wales apply against particular offences. Section 110 of the Powers of the Criminal Courts (Sentencing) Act 2000 (PCCSA) sets a minimum seven-year immediate custodial sentence for a third class-A drug trafficking offence, whilst s.111 requires the court to impose a prison term not less than three years for a third domestic burglary. The court does not have to impose the minimum sentence prescribed if it would be unjust in all the circumstances to do so.[3] Both sections have the effect of limiting judicial discretion on the basis of the offender's antecedents, the consequence being to all but prohibit short custodial and non-custodial sentences for offenders falling within these provisions. Whilst these minimum sentences fall within the sentencing range for a first-time offender and may therefore be commensurate with

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[1] M. Bagaric & J. McConvill, 'Giving Consent to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offence Seriousness and Penalty Severity' (2005) 69(1) *Journal of Criminal Law* 50, p.50

[2] A. von Hirsch, 'Desert and Previous Convictions in Sentencing' (1981) 65 *Minnesota Law Review* 591, p.631

[3] S.110(2) and s.111(2) PCCSA 2000

the seriousness of the immediate offence, the provisions were not enacted with the intention of heralding commensurability. The provisions have been criticised as 'relatively toothless'[4] given that the courts would ordinarily impose sentences beyond the minimum set, without need to rely on the provisions themselves. Nevertheless, the purpose of these provisions is to ensure minimum sentences regardless of the seriousness of the particular offence.

Therefore, for some offences, the legislature has determined that certain previous convictions can lead to an incommensurate sentence; that the need to control certain crimes, either through deterrence or incapacitation, when committed by repeat offenders usurps desert constraints as the primary sentencing determinant. Certain previous convictions are expressly relevant to the sentencing decision for some offences. But what is the position where the legislature has not so directly interfered with the sentencing decision? When dealing with offenders generally, what is the role of previous convictions? Do they usurp offence seriousness as the primary sentencing determinant? If so, what role is left for proportionality to play in these cases?

The purpose of this article is to consider the role of proportionality when sentencing repeat offenders for offences which do not carry a mandatory minimum sentence for the second, third or so transgression. The article is based on the results of a wider study on sentencing practice in theft cases.[5] It considers 225 cases concerning adult offenders sentenced for theft under the Criminal Justice Act 1991 when proportionality was the 'status quo'. The article considers the role of prior record at the sentencing stage, in particular the extent to which previous convictions may override proportionality constraints. The article also considers the findings from a series of interviews held with magistrates and Crown Court judges on the importance of prior record. Finally, the article

[4] A. Ashworth, *Sentencing and Criminal Justice* (2001, 3rd edition, Butterworths) p.179
[5] G. Betts, *Sentencing Convicted Thieves: Principles, Policy and Practice* (2011, unpublished PhD thesis, University of Coventry)

explores the extent to which the current sentencing regime as contained in the Criminal Justice Act 2003 may have impacted on sentencing practice in relation to previous convictions.

National statistics on Prolific and other Priority Offenders show that theft accounted for 20 per cent of proven offences committed by offenders identified as 'prolific', significantly more than for any other offence group.[6] The fact that recent governments have invested resources in producing and following up these statistics is evidence of the high policy profile afforded to persistent offenders.[7] The high incidence of thefts committed by prolific offenders renders it a particularly useful offence to study. Although the statistics do not refer to the seriousness of individual cases, it is interesting to acknowledge that for thefts committed by prolific offenders, immediate custody was the most frequently imposed disposal (42 per cent), with a further 8 per cent of offences being dealt with by a suspended sentence. Community penalties were imposed in 21 per cent of cases, with fines and discharges accounting for nine and 11 per cent of cases respectively. Eight per cent were dealt with by some other means (e.g. deferred sentence).[8] A study of nearly 1,500 people convicted of theft from a shop showed that the average offender had 42 previous convictions.[9]

Approaches to Punishing Persistence

There are broadly four approaches to dealing with previous convictions at the sentencing stage. First, a flat-rate system would accord no role for previous convictions at sentencing. The severity of the sentence imposed would be the same regardless of whether the offender was a first-time offender or had an unenviably long history of prior offending. This is the only truly retributive position; sentence is determined only by reference to the seriousness of the offence and, arguably, prior record has no bearing on this. Furthermore, it has been argued, not only should prior history be

[6] Home Office, *Prolific and Other Priority Offenders: Results from the 2009 Cohort for England and Wales*, p.8 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/115712/misc0310.pdf
[7] S. Easton & C. Piper, *Sentencing and Punishment* (2012, Oxford University Press, 3rd edition) p.83
[8] Home Office, *Prolific and Other Priority Offenders: Results from the 2009 Cohort for England and Wales*, p.15
[9] Sentencing Advisory Panel, *Sentencing for Theft from a Shop* (2008, Sentencing Advisory Panel), p.3

disregarded at the sentencing stage as an irrelevance to offence seriousness, but enhancing the sentence on the basis of prior offending amounts to punishing the offender twice for his previous transgression.[10] Despite being loyal to retribution, flat-rate sentencing has relatively few supporters.[11] The approach fails to appreciate the widely-held intuition that repeat offender should be dealt with more severely than first-time offenders.[12] Two other approaches have been raised which recognise this intuition whilst upholding the principles of proportionality; assigning weight to previous convictions at sentencing is not necessarily incompatible with desert. The two differ by virtue of divergent views over whether previous criminal history is a source of aggravation, or a lack of prior record is a source of mitigation.[13] Prior record may be taken into consideration within a retributive framework, either on the basis that a clean history demonstrates good character which is to be regarded as a source of mitigation, or that an offender's previous record enhances his culpability and therefore acts as an aggravating factor.[14]

The 'progressive loss of mitigation' approach affords only a limited role to prior record at sentencing. Under this model, a degree of mitigation is extended upon the first-time offender for his previous good character. For each subsequent lapse, the mitigation is reduced until eventually it is exhausted. Once the offender has accumulated sufficient previous convictions for the mitigation to be lost, any subsequent convictions are not treated as a source of aggravation. Effectively, the progressive loss of mitigation model envisages a sentence ceiling which is set by the seriousness of the current offence. Once the mitigation for previous good character has been exhausted and the ceiling is reached, no greater punishment, which would exceed the ceiling, can be imposed. Progressive loss is based on notions of lapse and tolerance.[15] Human frailty may lead us to make poor decisions, including

[10] M. Bagaric, 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* 10
[11] Most notably G. Fletcher, *Rethinking Criminal Law* (1978, Little Brown) p.460-6, and R. Singer, *Just Deserts: Sentencing Based on Equality and Desert* (1979, Ballinger) chapter 5
[12] J. D. Stuart, 'Retributive Justice and Prior Offences' (1986) 18(1) *The Philosophical Forum* 40, at 49
[13] J. V. Roberts, *Mitigation and Aggravation at Sentencing*, (2011, Cambridge University Press), p.222
[14] J. V. Roberts, *Mitigation and Aggravation at Sentencing*, (2011, Cambridge University Press), p.224
[15] A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005, Oxford University Press), p.151

criminal decisions, which may be particularly acute in the context of peer pressure and social deprivation.[16] Accordingly, the sentencing system should recognise these aberrations of weakness by offering a sentence discount as limited tolerance of a lapse. This tolerance reduces with each subsequent offence until, eventually, the discount is exhausted. At that point, the offender is no longer able to legitimately claim that the aberrations were uncharacteristic lapses.[17] The offender's plea that the act was out of keeping with his previous behaviour is most persuasive when he has no previous convictions. The persuasiveness is progressively lost with each subsequent transgression.[18]

Two problems with the progressive loss of mitigation approach are yet to be fully dealt with. First, how great a discount should be offered for a first offence? Von Hirsch offers nothing more concrete than to suggest that a 'modest discount' should be granted.[19] Given that the seriousness of the offence should remain as the principle sentencing determinant, a large discount would give too much weight to the offender's character. The discount should be sufficient to substantiate the mitigation owed to the first-time offender without contravening proportionality. The second, and somewhat related, problem concerns the rate at which the discount is progressively lost. Von Hirsch has suggested tath the discount may be lost after a fourth or fifth offence, although no reasoning is offered as to why.[20] Martin Wasik proposed that the discount would be exhausted after five convictions.[21] Subsequently, von Hirsch and Ashworth claimed that this is a matter of judgement: 'a possibility would be that the discount would be lost after about three prior convictions, but there are no magic numbers.'[22] Whilst the discount may not be exhausted at the same rate in all cases, the point of exhaustion should coincide with the moment when the offender can no longer convincingly

[16] A. Ashworth, *Sentencing and Criminal Justice* (2010, 5th edition, Cambridge University Press), p.201
[17] A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005, Oxford University Press), p.153
[18] A. von Hirsch, 'Desert and Previous Convictions in Sentencing' (1981) 65 *Minnesota Law Review* 591, p.597
[19] A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005, Oxford University Press), p.149
[20] A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005, Oxford University Press), p.149
[21] M. Wasik, 'Guidance, Guidelines and Criminal Record', in K. Pease & M. Wasik, *Sentencing Reform: Guidance or Guidelines?* (1987, Manchester University Press), p.118
[22] A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005, Oxford University Press), p.155

claim that his conduct was uncharacteristic. This is likely to occur relatively early in a criminal career, certainly before the offender has accumulated more than a handful of convictions.

Although the progressive loss of mitigation model pays some regard to the confines of proportionality, it is not an inherently retributive concept.[23] It is only after the offender's third or fourth conviction that the proportionate sentence is imposed. Whilst the offender is able to benefit from mitigation for a clean (or relatively clean) prior record, the penalty imposed is less than proportionate to the seriousness of his offence. However, progressive loss could be regarded as consistent with a retributive concept if a more sophisticated desert model was adopted which included prior criminal history as a constituent element of offence seriousness. Seriousness would thereby be measured in terms of the harm caused, risked or intended by the offence, the culpability of the offender in committing the offence, and the offender's prior record, or at least prior record could be relevant to assessing the offender's culpability. Either way, prior record could be regarded as relevant to determining the severity of the punishment deserved for the offence.

An alternative approach – a recidivist premium – has been reintroduced by Julian Roberts which, in keeping with the progressive loss of mitigation principle, aims to deal with previous convictions within the confines of desert. Unlike progressive loss, this theory does not work on the notion of mitigation for a first-time offender. Rather it calls upon a sentence premium for repeat offenders whereby greater punishment is imposed on those with a criminal history. The effect is the same as with progressive loss: the repeat offender is subject to greater punishment than the first-time offender. The difference lies in how the sentence is reached. With progressive loss, a proportionate sentence is imposed against the recidivist, whilst the first-time offender receives a discount from this. Under the recidivist premium model, the first-time offender receives the proportionate

[23] J. V. Roberts, 'The Future of State Punishment: The Role of Public Opinion in Sentencing', in M. Tonry (ed), *Retributivism Has a Past: Has it a Future?* (2011, Oxford University Press), p.118

sentence, and the recidivist is dealt with by way of an inflated sentence greater than that which is ordinarily deserved for that offence.

Finally, previous convictions could be used as a basis for imposing progressively more severe sanctions with each subsequent conviction under a cumulative approach, leading to the very real possibility that an offender (particularly a persistent petty offender) could be sentenced primarily on the basis of his record rather than in reference to the seriousness of his current offence. A cumulative approach could provide mitigation for a first-time offender, and therefore initially resemble the progressive loss of mitigation approach. Alternatively, a cumulative system may offer no mitigation for a clean prior record, similar to the recidivist premium. However, whilst a sentence ceiling is set under both the progressive loss and recidivist premium models, no such ceiling exists under a cumulative system. The consequence is that increases in sentence accrue exponentially with each subsequent conviction. Proportionality can play only a limited role under a cumulative system, and its influence recedes as convictions accrue.

The Role of Previous Convictions in England and Wales

Criminal Justice Acts 1991 and 1993

Prior to the enactment of the Criminal Justice Act 1991, the common law appeared to support the progressive loss of mitigation approach. The Court of Appeal in *Queen*[24] had ruled:

> 'The proper way to look at the matter is to decide on a sentence which is appropriate for the offence for which the person is before the court. Then in deciding whether that sentence should be imposed or whether the court can properly extend some leniency to the offender, the court must have regard to those matters which tell in his favour; and equally to those which tell against him, in particular his record of previous convictions.'[25]

[24] (1981) 3 Cr App R (S) 245
[25] Per Kenneth Jones, J at 255

The Court's reference to the potential to extend leniency and the reference to previous convictions seemingly suggests that a clean prior record could act in mitigation for the offender. The presence of previous convictions, on the other hand, might lead the court to conclude that no such leniency should be extended.

Under the 1991 Act, the seriousness of the offence was of paramount importance in determining sentence. Section 29(1) of the Act provided that, 'an offence shall not be regarded as more serious...by reason of any previous convictions of the offender or any failure of his to respond to previous sentences', and s.28 permitted the court to have regard to 'any such matters as, in the opinion of the court, are relevant in mitigation...' Therefore, if the sentencing court was of the opinion that a clean prior record could be regarded as a source of mitigation, it would be entitled to extend some leniency toward the first-time offender.

Section 29(1) led to some unrest within the judiciary and magistracy who claimed it prevented them from taking into account an offender's criminal record.[26] Of course this was Parliamentary intention, nevertheless s.29 was ultimately repealed and replaced with a new provision, inserted by s.66(6) of the Criminal Justice Act 1993:

> 'In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences.'

The proportionality constraints contained elsewhere within the 1991 Act remained, requiring the court to principally determine sentence on the basis of offence seriousness. [27] Wasik and von Hirsch argued that the new s.29 should not be viewed as conferring a wide discretion on courts to aggravate sentence on the basis of prior record, as this would be impossible to reconcile with other

[26] A. Ashworth, *Sentencing and Criminal Justice* (2000, 3rd edition, Butterworths) p.170

[27] That a custodial sentence could only be imposed if the offence was 'so serious' that only custody could be justified (s.1(2)(a) CJA 1991), that the length of any term of imprisonment must be commensurate with the seriousness of the offence (s.2(2)(a)), a community sentence could only be imposed if the offence was 'serious enough' to justify such a sentence (s.6(1)), and the restrictions placed on the offender were to be commensurate with the seriousness of the offence (s.6(2)(b)).

key provisions contained within the Act.[28] The wording of the new s.29 was a little unfortunate. On the one hand, it stated that previous convictions could be taken into account *in considering the seriousness of the offence*. Thus prior record was itself a relevant factor in assessing the seriousness of the offence; an offender sentenced largely on the basis of his prior record would not be sentenced disproportionately. On the other hand, the then government was not seeking to introduce a system of cumulative sentencing through this provision;[29] the intention must then have been to afford only a limited role to prior history. Despite this, some Court of Appeal authorities pointed to the courts' use of previous convictions as a source of aggravation, having little regard to proportionality constraints. In *Spencer & Carby*,[30] the Court ruled that 'without doubt the offences for which [the offenders] were being dealt with could properly be viewed as more serious by reason of [their] appallingly long records.'[31] Sentencing statistics at the time indicated that the courts were likely to accord significant weight to an offender's previous convictions.[32]

Criminal Justice Act 2003

Section 143(2) of the Criminal Justice Act 2003 introduced a new provision on the role of previous convictions which purports to place even greater prominence on the offender's prior history. It provides:

> In considering the seriousness of an offence ('the current offence') by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to –
>
> (a) The nature of the offence to which the conviction relates and its relevance to the current offence, and
>
> (b) The time that has elapsed since the conviction.

[28] M. Wasik & A. von Hirsch, 'Section 29 Revisited: Previous Convictions in Sentencing' [1994] Crim LR 409, p.412
[29] Hansard, June 29 1993, col. 906, cited in M. Wasik & A. von Hirsch, above.
[30] (1995) 16 Cr App R (S) 482
[31] Per Cowan LJ, at 485-6
[32] For discussion, see J. V. Roberts, 'Alchemy in Sentencing: An analysis of sentencing reform proposals in England and Wales' (2002) 4 *Punishment and Society* 425, p.430

The provision is consistent with a cumulative approach whereby the severity of the sentence increases with each subsequent conviction. There is no limit to the number of previous convictions which can be taken into consideration. The provision seems to adopt a 'step function', with increments in severity accruing with every (relevant) previous conviction.[33] Where an offender has amassed a number of recent relevant convictions, the result could be a wildly disproportionate sentence which pays little regard to the seriousness of the current offence and instead sentences the offender primarily on the basis of his prior record.

One possible interpretation of s.143(2) is to regard previous convictions as an aggravating factor *of the offence*, either on the basis of the harm caused or (more likely) the offender's culpability. That is to say, that the seriousness of the offence itself is increased by virtue of the offender's prior criminality. However, while the then Criminal Justice Bill was passing through Parliament, statements were made to confirm that s.143(2) would 'not mean wildly disproportionate sentences, because the sentences will operate within the principle, which is established later in the [Act], that the severity of the resulting sentence should reflect the seriousness of the current offence...The clause modifies the proportionality principle that previous relevant offences can act as an aggravating factor.'[34] Although not expressed within the Act, it appears that parliamentary intention was that courts would apply s.143(2) within confines set by other provisions reflecting the need to uphold principles of proportionality. Indeed, the Court of Appeal has on a number of occasions reaffirmed the principle that the sentence imposed must be kept in proportion to the seriousness of the immediate offence, despite the offender's prior record.[35] This sentiment raises two points. First, the courts are likely to uphold the principle of proportionality even when dealing with a repeat offender. In other words, s.143(2) is not, in itself, just reason for departing from the confines of proportionality. Second, prior record is not an intrinsic element of the seriousness of an offence; it is not an offence-related

[33] A. von Hirsch & J. V. Roberts, 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions' [2004] Crim LR 639, p.648
[34] Hilary Benn, House of Commons Standing Committee B, 30th January 2003, Col.748
[35] For example, see *Neasham* [2012] EWCA Crim 542; *Bryne* [2012] EWCA Crim 418

aggravating factor. Therefore, the offence *itself* is not rendered more serious on the basis of prior record.

Findings from the Crown Court Sentencing Survey

The Coroners and Justice Act 2009 abolished the Sentencing Guidelines Council and Sentencing Advisory Panel,[36] and replaced these with a single Sentencing Council for England and Wales. One of the duties of the Council is to 'monitor the operation and effect of its sentencing guidelines'.[37] The Council discharges this duty through the Crown Court Sentencing Survey. The Crown Court is required to complete a sentencing form each time it sentences an offender for a new offence.[38] In an effort to limit the burden placed on judges, each sentencing form covers only a single side of A4 paper. As such, the survey cannot cover all possible aspects of the case, although it does capture data on the number of 'relevant and recent' previous convictions taken into consideration by virtue of s.143(2) of the 2003 Act. Owing to the fact that the sentencing survey also collects information on other aggravating and mitigating factors (in addition to previous convictions), it is not possible to discern precisely what impact the prior record had on the sentence imposed.

Findings from the Crown Court Sentencing Survey show that offenders with relevant and recent previous convictions are more likely to be imprisoned, with this likelihood increaseing as previous convictions accumulate. For all offences covered by the Survey, immediate imprisonment was imposed in 44 percent of cases in which no previous convictions were taken into account. This figure increases to 64 percent for offenders with between one and three relevant convictions, rising again to 76 percent with four to nine convictions, and 79 percent for offenders with ten or more convictions.[39]

[36] S.135 Coroners and Justice Act 2009
[37] S.128(1) Coroners and Justice Act 2009
[38] Offenders who are resentenced for an earlier offence, perhaps having breached a previous court order, are not included in the survey. Furthermore, when dealing with multiple offences, the Crown Court is only required to complete a sentencing form in relation to the most serious offence.
[39] Figures adapted from Sentencing Council, *Crown Court Sentencing Survey* (2012)

Whilst it is possible that a large proportion of offences committed by those with prior history would warrant imprisonment notwithstanding that history, this may be evidence of previous convictions impacting on the severity of the sentence imposed. However, definitive conclusions cannot be made because the Survey findings do not consider the seriousness of the offence in each case, and the weight attributed to previous convictions in isolation to other factors. What follows here is an analysis of theft cases, and the apparent impact criminal history had on the sentencing decision.

The Apparent Influence of the Offender's Criminal Record

Table 1 shows the relationship between sentence type and total number of previous convictions. Of the 225 cases within the sample, only 16 involved offences committed by first-time offenders; the majority of offenders had a record of prior offending, with 172 (76.4%) having ten or more previous convictions. The table indicates a moderate distribution of various sentence types amongst offenders with differing criminal histories, with discharges and fines used frequently in cases involving persistent offenders. The table also shows that the courts may impose custodial or community sentences, notwithstanding an offender's clean prior record.

Table 1: Sentence Type and Total Previous Convictions

		Total number of previous convictions				
		None	1 - 3	4 - 9	10 +	Total
Custody	Count	4	1	5	67	77
	%	25.0%	11.1%	17.9%	38.9%	34.2%
Community	Count	6	1	17	57	81
	%	37.5%	11.1%	60.7%	33.3%	36.0%
Financial	Count	3	4	3	22	32
	%	18.8%	44.4%	10.7%	12.8%	14.2%
Discharge	Count	3	3	3	26	35
	%	18.8%	33.3%	10.7%	15.1%	15.5%
Total	Count	16	9	28	172	225
	%	100.0%	100.0%	100.0%	100.0%	100.0%

There is some evidence to suggest that not all previous convictions are relevant at the sentencing stage; that the previous conviction should only be considered if it is similar to the current offence.[40] Table 2 shows the relationship between sentence type and number of previous convictions for theft (that is, of the same type as the immediate offence). Whilst fines and discharges may be imposed on habitual thieves, they are more likely to be imposed on offenders who do not have a record of similar offending. Conversely, custodial sentences are more frequently imposed on those with a history of similar offending, although they were on occasion imposed against offenders with no such history.

Table 2: Sentence Type and Previous Convictions for Theft

		Total number of previous convictions				
		None	1 - 3	4 - 9	10 +	Total
Custody	Count	4	7	14	52	77
	%	13.3%	15.9%	33.5%	47.7%	34.2%
Community	Count	10	22	19	30	81
	%	33.3%	50.0%	45.2%	27.5%	36.0%
Financial	Count	8	7	6	11	32
	%	26.7%	15.9%	14.3%	10.1%	14.2%
Discharge	Count	8	8	3	16	35
	%	26.7%	18.2%	7.1%	14.7%	15.5%
Total	Count	30	44	42	109	225
	%	100.0%	100.0%	100.0%	100.0%	100.0%

There are two principal issues for consideration here. The first is whether the decision to impose a custodial or community sentence on repeat theft offenders appears to be based on the seriousness of the offence or whether they sentence was determined according to record. Second is the courts'

[40] For a historical account see M. Wasik 'Guidance, Guidelines and Criminal Record', in K. Pease & M. Wasik (eds) *Sentencing Reform: Guidance or Guidelines* (1987, Manchester University Press)p.108-9. Whilst sentencing under the 1991 CJA (as amended by 1993 Act), it appears magistrates were directed to consider similarity; see Magistrates' Association *Sentencing Guidelines* (2000). S.143(2) CJA 2003 now requires the court to have regard to the nature of the previous offence and its relevance to the current offence. Under Swedish law, a previous conviction for a strikingly different type to the current offence will usually be regarded as immaterial. See P. Asp, 'Previous Convictions and Proportionate Punishment under Swedish Law', in J.V. Roberts & A. von Hirsch (eds), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010, Hart), at page 213

use of fines and discharges against repeat offenders; if prior criminal history can be aggravating, why might the court decide not to impose a more punitive sentence?

Custody and Repeat Offenders

Table 2 indicates a tendency for repeat theft offenders to receive custodial or community sentences. Whilst prior record may have been a relevant consideration, in many cases the decision to imprison is explicable by reference to the greater seriousness of the offending, or due to the offender's circumstances (for example recall to prison following reoffending on whilst on prison licence). A minority of cases, on the other hand, might offer some evidence of the courts sentencing on record. Case 023 involved the theft of hardware valued £45. The offender had accumulated 57 previous convictions, 22 of which were for theft, with nine theft convictions in the last year. He was ordered to serve a three month prison term, arguable significantly out of proportion to the seriousness of the offence. In case 144, the offender had stolen perfume valued £66. The offender was detained at the scene, the property was recovered and a guilty plea was entered; there was no apparent offence aggravation present. The offender had 44 previous convictions, 22 for thefts, with seven shopliftings being recorded in the past year. He was sentenced to 28 days' imprisonment. Case 059 concerned a female offender who had stolen food valued £60. Similarly to case 144, there was no apparent offence aggravation. The offender had 19 previous convictions, 14 of which were for similar thefts, including 13 theft convictions in the year preceding the immediate offence. He was sentenced to four months' imprisonment. In each case, the decision to imprison does not appear to be justified by reference only to the seriousness of the offence. The offender's record, and the frequency of recent theft offending in particular, may explain the decision to imprison.[41]

[41] The decision to imprison may rest heavily on the offender's background and circumstances. One study found that offenders would be imprisoned in borderline cases where the court regarded their character as 'irredeemable'; J. Tombs & E. Jagger, 'Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison' (2006) 46 BJ Crim 803, at 814-20

The offender in cases 094 and 095 was sentenced to serve seven-day concurrent prison terms for two low-value shopliftings (£11 and £6 respectively). The decision to imprison was unlikely to have been made on the basis of offence seriousness, notwithstanding the commission of two offences – a fine would have been a more proportionate response - but the court seems to have been influenced by the offender's prolific recent offending record, which included nine convictions (five for similar shopliftings) in the preceding twelve months. That being said, the offender had not been made the subject of a community sentence since 1994 (which was not breached). In the circumstances therefore, it seems odd that the court did not consider a community order in an attempt to address the offender's criminality.[42]

The sample included only three cases resulting in a suspended sentence; two imposed by the magistrates' court and one in the Crown Court. The two magistrates' cases were typical shopliftings,[43] which ordinarily would not have crossed the custody threshold on the basis of seriousness owing to a lack of aggravating features. In case 051, the offender had stolen property valued £100 from a shop. She was detained at the scene, the property was recovered and an admission of guilt was made. The court suspended a 28-day period of imprisonment for six months. The offender had been made the subject of a CRO one year earlier, which was breached six months later following reconviction for shoplifting. As a result, the court revoked the CRO and resentenced her to a period of imprisonment. Since then, the offender had been imprisoned on a further occasion, again for shoplifting. The decision to impose a suspended sentence seems to have been based on both the offender's prior history and offence seriousness. Whilst the court may not have believed that the gravity of the offence justified imposing a term of immediate imprisonment, the offender's previous sentences had demonstrated an unwillingness to comply with community

[42] One might speculate that there was information available to the court, perhaps in a PSR, indicating that the offender was unwilling to cooperate with a community sentence or was otherwise unsuitable.

[43] Many of the sample's retail thefts occurred under common circumstances: the offender would enter the store, select the goods (usually of a modest value), conceal the property and attempt to leave the shop without offering payment. The offender would then be detained at the scene, where the property would be recovered and the offender would admit the offence. Little or no offence aggravation is apparent. These offences are referred to here as 'typical' shopliftings.

orders. This may have discouraged the court from imposing further community sentences even though such a penalty may have been a prima facie proportionate response to the offence. If this was indeed the case, it would be evidence of the courts imposing suspended sentences even where the custody threshold is not crossed, perhaps viewing them instead as a non-custodial sentencing option which can thereby be imposed for cases only crossing the community-sentence threshold but falling short of the custody threshold.[44]

Discharges, Fines and Repeat Offenders

Table 2 shows that discharges and fines were imposed in 51 cases for offences committed by repeat theft offenders, including 27 where the offender had amassed ten or more convictions for similar offending. In contrast with the above cases, the offender's significant criminal history was not enough to lead the court to impose a custodial (or community) sentence. In case 162 in which the offender had stolen from a shop alcohol valued £3.50, the court imposed a twelve-month conditional discharge, notwithstanding the offender's history of 119 previous convictions including 79 thefts. Likewise, in case 161, a conditional discharge was imposed on the offender who had committed a typical shoplifting, known to have been motivated by his drug addiction. He had 76 previous convictions, including 25 thefts, and was conditionally discharged for 12 months. The offender had not been made the subject of a DTTO in the past. It is unknown why the court decided not to address the underlying cause of the offending through a rehabilitative disposal option but, owing to the non-serious nature of the offence, the sentence does not appear to be disproportionate. Similarly, the offender in case 134 had stolen goods valued £2.50 from a shop, and was detained at the scene whereupon he admitted the offence. Although he had a known drug addiction and his record included 22 previous convictions for similar offending, the court imposed a £25 fine, no doubt a reflection of the relative non-seriousness of the offence; no sentence premium was added in respect of the prior record.

[44] These concerns that suspended sentences could be imposed for cases only warranting a community sentence were raised in A .Bottoms, 'The Suspended Sentence in England, 1967-1978' (1981) 21 BJ Crim 15, at 15

Often, the decision to discharge repeat offenders appears to have been based on the offenders' circumstances. In six of the 16 cases, the decision to discharge may have been based on the offenders' recent break in offending. In case 088, the offender was made subject of a six-month conditional discharge following a guilty plea for shoplifting. Her last offence recorded was for shoplifting in 1998 (six years prior to the current offence) for which she was handed a £200 fine. Elsewhere, a discharge could also be imposed, even with a shorter break in offending: cases 127 and 136 both concerned offenders with known drug addictions and both were dealt with by way of a conditional discharge. Both had lengthy records: the offender in case 127 had 33 previous convictions, including 11 for theft; the offender in case 136 also had 33 previous convictions, with 14 thefts. They had a recent break in offending of eight months and one year respectively, which may have acted as a source of mitigation. The decision to discharge may have been based on the (albeit relatively short) break in offending. This suggests, if such was needed, that taking criminal history into account at sentencing is not a matter of merely counting the number of convictions; that there is significance in the contemporaneity and frequency of offending, and particular weight may be attached to a recent break in offending notwithstanding a lengthy record preceding it.

In other cases, the offender's discharge appears to have been determined on the basis of an existing order. In four of the 16 cases, a drug treatment and testing order had recently been imposed and was ordered to continue. The offender in each case was thereby discharged for the current offence. In one further case, the offender was voluntarily seeking drug treatment. His 23 similar previous convictions did not discourage the court from discharging him, seemingly not wishing to interfere with his drug treatment.

Community Sentences and Repeat Offenders

Where an offender's prior record demonstrates a pattern of offending, it will often inform the approach taken by the court in sentencing. As outlined below, during interview all judges and magistrates had identified rehabilitation as the primary purpose when sentencing persistent offenders whose criminality is born from a drug or alcohol addiction. Consequently, some offenders with lengthy records for similar offending may be more likely than others to receive seemingly disproportionate but rehabilitative sentences such as community rehabilitation orders (CRO) and drug treatment and testing orders (DTTO).[45] This suggests that a community sentence may be imposed in cases where the seriousness of the current offence does not satisfy the threshold test under s.148(1) of the 2003 Act (and its predecessor under s.35(1) of the PCCSA 2000).[46] If enacted, s.151 of the 2003 Act (as amended by the Criminal Justice and Immigration Act 2008), which substantially re-enacts s.59 of the 2000 Act, would permit the imposition of a community sentence upon an offender who had been fined on three previous occasions since the age of 18, whose current offence is not serious enough to warrant a community sentence, but for whom the court concludes such a sentence would be in the interests of justice. Whilst s.151 has not yet been brought into force, s.143(2) of the 2003 Act on the aggravating effect of previous convictions may render its enactment unnecessary: a court could regard the current offence as serious enough to warrant a custodial sentence in light of the offender's previous convictions. Indeed this provides a wider power as, unlike s.151, it would empower the court to impose a community sentence even where the offender has not previously been fined on three or more occasions.

The study included a number of cases resulting in a community sentence, apparently justified on the basis of offence seriousness. Yet elsewhere in the sample, it appears that a community sentence was imposed to reflect the offender's criminal history. A 12-month CRO was imposed upon the offender

[45] These orders have since been replaced by the CJA 2003. S.177 provides 12 requirements that a court may make as a community sentence including a supervision requirement under s.213 (replacing the community rehabilitation order), and a drug rehabilitation requirement under ss.209-11 (replacing the drug treatment and testing order).

[46] A court must not pass a community sentence unless of the opinion that the offence was "serious enough to warrant such a sentence."

in case 065 following her admission to having stolen clothing valued £170 from a shop. The offender had ten previous convictions, including three for theft. Her co-offender had a clean prior record and was conditionally discharged. Since both had played an equal role in the offence, the difference in sentencing cannot be explained by reference to the offence. Rather, it must be due to a difference in the offenders' characters. The value of the goods stolen probably placed the offence on the cusp of the community-sentence threshold. Whilst the co-offender's clean record pulled the sentence down to a discharge, the offender's prior convictions appears to have had the effect of placing the sentence more firmly in the community-sentence bracket.

Case 215 appears to be a clear illustration of prior record being used to impose a disproportionate sentence. The offender had committed a typical shoplifting involving goods worth £17, for which a proportionate sentence may have been a fine. His prior record shows a recurring pattern of offending. The court imposed a 12-month and 50-hour community punishment and rehabilitation order (CPRO). It seems unlikely that the offence itself was serious enough to justify the imposition of a community sentence, particularly one as demanding as a CPRO, and the court may have taken a more punitive approach in light of his record.

When sentencing offenders with drug addictions, the courts will often seek to rehabilitate the offender through the imposition of a DTTO, providing that the offence is does not cross the custody threshold or is so trivial that a community sentence would be clearly disproportionate. The sample included 35 cases (committed by 18 offenders) resulting in a DTTO; all involving thefts from shops. Twenty-four cases (committed by 14 offenders) involved typical shopliftings where the value of the property stolen was below £100. As relatively non-serious offences, the decision to impose a community sentence may not have been justified on the basis of offence seriousness.[47] It was

[47] Where the offence was trivial, the court may have been dissuaded from imposing a DTTO, even where the offence was a consequence of the offender's drug addiction. In case 134, the offender had committed theft from a shop, having stolen

common for offenders subjected to a DTTO to have numerous similar previous convictions, demonstrating a pattern of offending due to their addictions, which may have influenced the court to impose a DTTO in the hope of offering some rehabilitation. For example, the offender in case 112 had committed a typical retail theft involving property valued £23. The gravity of the theft would point to no more than a fine on the basis of proportionate sentencing. He had 77 previous convictions, including 35 for theft. The court imposed a 12 month DTTO. The interviews showed a view unanimously held by all sentencers that the courts should aim to rehabilitate those who persistently offend due to a drug or alcohol dependency,[48] although the court should pay regard to whether the offender's addiction is susceptible to treatment in accordance with section 52(3) of the PCCSA 2000. Nevertheless, it is the offender's record and criminogenic addiction which led the court to impose a community sentence.

Whilst it appears that prior record may affect the type of sentence imposed, it can also have the effect of increasing the duration of a community-sentence beyond what a strictly proportionate approach would necessitate. CROs contained in the sample ranged from six to 24-months in duration, although the length of the order did not appear to necessarily reflect the gravity of the offence. Twelve cases resulted in the imposition of 18-month or 24-month orders, which included some of the more serious offences.[49] However, long orders were also imposed for typical shopliftings committed by offenders with substantial criminal records, again indicating that gravity is informed by both offence and offender factors. Case 169 involved the typical shoplifting of goods worth £70. The offender had 110 previous convictions, 66 of which were for similar offences, and was made the subject of a 24-month CRO. Similarly, an 18-month order was imposed in case 137 following a £75 typical shoplifting committed by an offender with 106 previous convictions including 33 thefts.

goods valued £2.50. The court ordered the offender to pay a £25 fine rather than imposing a DTTO. The offence may have been too trivial to justify the imposition of a community sentence.

[48] See below

[49] For example, cases 024 and 025 concerned an offender who had removed CCTV cameras worth £750 from two business premises. The offences were clearly planned and the offender had gone to the scene equipped to commit the thefts.

Where an offender's record demonstrates a sustained pattern of offending, the court may believe that only a lengthy order would provide adequate opportunity to successfully rehabilitate the offender and reduce his propensity to reoffend. But from a purely proportionality perspective, the CROs in these cases should probably have been no more than half the durations that were imposed.

Further evidence of prior history informing the duration of an order can be found in cases 027, 028 and 029. Three offenders had climbed a fence and stolen scrap metal from a merchant's yard at 2.00am. Each offender was made the subject of a four-month night curfew, except for the offender in case 029 whose curfew was ordered to run for five months, perhaps due to his lengthy criminal record: whereas the offenders in cases 027 and 028 had six and seven previous theft convictions respectively, the offender in 029 had 39 previous convictions for similar offences. No doubt the fact that the offence occurred in the early morning influenced the court to impose curfews, which would restrict the liberty of the offenders and incapacitate them from committing further offences at similar times of the day, whilst the offences were serious enough to cross the community sentence threshold.

Prior Record and Sentencers' Opinions

Part of this study involved a series of semi-structured interviews with magistrates and Crown Court judges, all of whom were asked of the weight they assigned to previous convictions, if any. All interviewees expressed the view that previous convictions were an important factor in the sentencing process, although they were careful not to overstate the role played. Interviewees tended to note an important, but limited, role afforded to previous convictions:

> Magistrate 3: I think [previous convictions] are important but on the other hand...they have actually served the sentence for what they have done before. You take them into account but not wholly depending on that. Some magistrates look at it differently. I look at it that they have already been punished for that...You do take it into account, but not too highly.

This view, that previous convictions are relevant at the sentencing stage but that the role must be carefully considered, was shared by many of those interviewed. Previous convictions were regarded as most important when indicating a pattern of offending, and interviewees demonstrated more certitude on this point:

> Magistrate 4: [The offender's prior record is] significant if it shows a pattern of offending...You *have* to look at [similar] previous convictions when determining the penalty. I know they are a penalty served, and some people might say they are gone, been done and dusted and you should not pay any attention to them, but you *have* to because it shows a pattern of offending and it assists the way in which that punishment has to be imposed.

The question of how much impact prior record has on sentence was not one with a seemingly easy answer. However, it became apparent during the interviews that, whilst the offender's prior record is likely to be taken into consideration, the seriousness of the current offence remains the chief determinant of the penalty:

> Magistrate 8: I do not think the sentence is ever driven by the record. I always guide people to think of the record as the last thing. I would say that the antecedents is the last thing to look at and should not drive the sentence.

All interviewees agreed that prior criminality may lead the court to take a different approach to sentencing, perhaps with a greater emphasis being placed on rehabilitation. This may not mean that the offender is necessarily made subject to a more punitive order *per se*, but rather a different type of sentence is chosen by virtue of the fact that a different approach has been adopted:

> Judge 2: If it is a minor offence of theft, the previous convictions may well be pushing you towards rehabilitation because it is recognising a pattern under which lies a drug problem.

The responses to questions concerning previous convictions showed the courts were only too aware of the complexities involved in taking prior offences into account at sentencing. A Crown Court Judge believed it to be a difficult balancing exercise:

> Judge 2: But the thing you have got to be very, very careful of about previous convictions is that you are not punishing someone yet again for what they have done before. Yes, it is an aggravating feature but it does not assume such proportions as to mean in effect they are being sentenced twice.

Some interviewees also spoke of the significance attached to a clean record. Whilst a pattern of offending can be an aggravating feature, a clean prior record can act as significant mitigation. This seems to leave no neutral ground; either the offender will receive a discount for his clean record or any previous convictions will be used as a source of aggravation:

> Judge 1: What is very important, and I pay great regard to this, is the absence of previous convictions. I think we all do. It is a hugely mitigating feature that someone is doing this for the first time. I am not particularly persuaded by the fact that he has not got any convictions for stealing from a shop but he has got 1,001 previous convictions for burglary, or vice versa. I am impressed by the fact that he has never been in trouble before.

The above quote by Judge One claims that a lack of *any* previous convictions, whether of a similar nature to the current offence or not, is a significant source of mitigation. Previous responses by other interviewees had demonstrated that relevant (similar) previous convictions acted in aggravation, but the existence of dissimilar previous offences are *not* an aggravating source. Together this leads to the conclusion that the only neutral-ground (where prior record is neither mitigating nor aggravating) occurs where an offender has only previous convictions of a dissimilar nature. He would not be entitled to mitigation for a clean prior record, but his record would not be aggravating since the convictions are of a dissimilar nature to the current offence.

Conclusions

The quest for perfection in proportionality is elusive: there will rarely (if ever) be a single proportionate sentence for an offence. Deciding whether or not a sentence is proportionate is an art rather than a science, and the measurement of offence seriousness is ultimately subjective. Recently

there has been a call to abolish imprisonment for all property offences, irrespective of the offender's record, since these crimes should not be regarded as sufficiently serious to cross the custody threshold.[50] Whilst this view is not adopted here, the case analysis is nevertheless based on a subjective interpretation of the seriousness of each offence and, therefore, the likely impact of prior record.

Studies on sentencing statistics show that repeat offenders are more likely than first-time offenders to receive custodial sentences, but these statistics do not consider offence seriousness.[51] This study offers some evidence of previous convictions informing the sentencing decision, either by pushing the sentence over the community sentence or custody threshold, or by impacting on the length of sentence, particularly in relation to the imposition of community sentences. A disproportionate custodial sentence may be imposed following very frequent and recent offending, rather than merely on the basis of the number of previous convictions the offender has accumulated. Conversely, the offender's record in other cases appears to have had no impact on the sentencing decision, with some repeat offenders receiving financial penalties and discharges. Often, this decision appears to be based on the offender's circumstances at the time (such as his subjection to a pre-existing court order) or, perhaps, is due to the relative non-seriousness of the offence. In the majority of custody cases, the decision to imprison may have been justified by reference to offence seriousness, although that is not to say that the offender's record was not a material factor.

There have been suggestions that statutory provisions relating to the relevance of previous convictions are not routinely referred to in court.[52] However, the current sentencing guidelines on

[50] A. Ashworth, *What if Imprisonment Were Abolished for Property Offences?* (2013, Howard League for Penal Reform)
[51] For example, C. Flood-Page & A. Mackie, *Sentencing Practice: An examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990s* (1998, Home Office Research Study 180, Home Office)
[52] M. Wasik 'Dimensions of Criminal History: Reflections on Theory and Practice', in J. V. Roberts & A. von Hirsch (eds), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010, Hart), at 181

theft make reference to previous convictions as an aggravating factor.[53] These guidelines were produced by the Sentencing Guidelines Council and will remain in force until the Sentencing Council issues its own guidelines to succeed them.[54] Guidelines produced by the Sentencing Council, which do not cover theft, similarly make reference to the aggravating effect of previous convictions, but also provide that a clean prior record, or lack of relevant and recent convictions, is a mitigating factor.[55] However, the guidelines do not advise on the weight to be attached to previous convictions and whether prior record can justify a disproportionate sentence. The duty on courts is to impose a sentence within the offence range, rather than the narrower category range.[56] Prior record may thereby push the sentence into a higher category than that determined by the seriousness of the offence, without constituting a departure from the guidelines.

Section 143(2) of the CJA 2003 has been in force for almost a decade, yet there remains apparent uncertainty over how previous convictions ought to impact the sentencing decision. This uncertainty is palpable from the interviews with magistrates and judges discussed here, where interviewees expressed a view that prior record is a relevant consideration, but the precise role played is much more difficult to articulate. Nevertheless, the general view appears to be that prior record should not eclipse proportionality as the primary sentence determinant. The courts have parallel duties to have regard to the seriousness of the offence whilst also viewing prior record as an aggravating factor. The role of previous convictions needs to be placed within the context of both offence seriousness and the offender's circumstances. A cursory review of some recent Court of Appeal judgments helps to illustrate this conflict. In *R v Byrne*,[57] the Court held that whilst the appellant had "an appalling record" of similar offending, the sentence imposed by the trial judge was out of proportion to the offence committed: "any determinate sentence should bear some relationship to the seriousness of

[53] Sentencing Guidelines Council, *Theft and Burglary in a Building Other than a Dwelling: Definitive Guideline* (2008, Sentencing Guidelines Council), p.8
[54] A. Ashworth & J. V. Roberts, 'The Origins and Nature of Sentencing Guidelines in England and Wales', in A. Ashworth & J.V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013, Oxford University Press), p.15
[55] For example, Sentencing Council, *Assault: Definitive Guideline* (2011, Sentencing Council), p.5
[56] S.125 Coroners and Justice Act 2009
[57] [2012] EWCA Crim 418

the offence for which it is passed." Similar judgments were given in *R v Neasham*,[58] *R v Gibson*,[59] *R v Langley*,[60] and most recently *R v Bailey.*[61] However, the Court in *R v Taylor*[62] held that the appellant's previous convictions were rightly regarded as "very considerable aggravating features" which justified a sentence at the upper end of the appropriate sentence range for the offence as prescribed by the relevant guideline, if not beyond the appropriate range. This demonstrates the weight that weight that may be attributed to prior record, with the consequence of pushing at the confines of proportionality, if not swinging the gate wide open.

[58] [2012] EWCA Crim 542
[59] [2012] EWCA Crim 1558
[60] [2011] EWCA Crim 2471
[61] [2013] EWCA Crim 1779
[62] [2013] EWCA Crim 15